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INTERCEPTION! THE COURTS GET ANOTHER PASS AT THE NCAA AND THE INTENTIONAL DISCRIMINATION OF PROPOSITION 16 IN *PRYOR V. NCAA*

I. INTRODUCTION

The implementation of the National Collegiate Athletic Association's (NCAA) initial eligibility requirements for athletic participation sparked controversy when they were first enacted as Proposition 48 sixteen years ago.¹ The controversy continues today with the adoption of revised guidelines entitled Proposition 16.² Proposition 16 has generated a great deal of outspoken opposition from coaches and organizations such as the Black Coaches Association.³

Most of the challenges to the NCAA's initial eligibility requirements center around their impact on minority student-athletes.⁴

1. See Mark Asher, *NCAA Could Alter Eligibility Standards; Test Score Emphasis Might Be Played Down*, WASH. POST, Aug. 8, 2002, at D1 (noting new NCAA eligibility requirements led to protests when Proposition 48 was passed). The most vocal protests came from "coaches, college administrators and others who argued that the [SATs] were racially and socioeconomically biased, as well as an inaccurate indicator of academic potential." *Id.*; see also Welch Suggs, *Who's Going to Play? Coaches and Advisors Fear Racial Impact of the NCAA's Proposed Academic Standards*, CHRON. HIGHER EDUC., July 26, 2002, at 43 (discussing coaches' beliefs that NCAA emphasis on academics is really about race). Jim Harrick, former men's basketball coach at the University of Georgia, claimed that the NCAA was "legislating against African-American individuals." See *id.* John Chaney, Temple University's men's basketball coach, called the standards "ethnic cleansing." See *id.*

2. See Suggs, *supra* note 1, at 43 (asserting outspoken opponents of Proposition 48 have returned to fight against Proposition 16); see also Robert K. Fullinwider, *Academic Standards and the NCAA*, at http://www.puaf.umd.edu/IPPP/spring_summer99/academic_standards.htm (last visited Feb. 11, 2003) (explaining black coaches were so angered by Proposition 16 that they considered boycotting NCAA events).

3. See Fullinwider, *supra* note 2 (noting arguments against Proposition 16, pointing out some students need individual assessment and Proposition 16 excludes students who could succeed in college). "[I]n the words of the Black Coaches Association, 'minority and low-income student athletes, academically qualified as measured by their classroom performance,' have borne the brunt of a misguided effort to set academic standards." *Id.* (quoting statements by Black Coaches Association).

4. See *id.* (stating Proposition 16 is unfair due to its disproportionate effect on African-American student-athletes); Suggs, *supra* note 1, at 43 (calling NCAA racist organization).

Opponents to the guidelines allege that the guidelines discriminate along racial and socioeconomic lines.⁵

The gravamen of their complaint: the use of the SAT cut-off score, which blacks fail to reach in markedly higher proportions than whites. John Thompson, then-coach of Georgetown University's basketball team, complained that poor minority kids were at a disadvantage taking the "mainstream-oriented" SAT. "Certain kids," he noted just after the federal court's decision, "require individual assessment. Some urban schools cater to poor kids, low-income kids, black and white. To put everybody on the same playing field [i.e., to treat them the same in testing] is just crazy."⁶

When the more rigorous Proposition 16 replaced the initial guidelines of Proposition 48, black coaches were so angered that they threatened to boycott NCAA events.⁷

In *Pryor v. NCAA*,⁸ the United States Court of Appeals for the Third Circuit faced the latest challenge to the legality of Proposition 16.⁹ The NCAA insists one of Proposition 16's goals is to improve graduation rates among African-American student-athletes.¹⁰ The two African-American plaintiffs in this case alleged the policy's true goal was to "screen out" black student-athletes from receiving athletic scholarships.¹¹ Plaintiffs brought their claims against the NCAA under Title VI of the Civil Rights Act of 1964 ("Title VI")

5. See Suggs, *supra* note 1, at 43 (explaining coaches' beliefs that by instituting Proposition 16, NCAA is telling coaches to recruit white players instead of black ones from poor backgrounds).

6. Fullinwider, *supra* note 2. The federal court decision *Cureton v. NCAA* sparked these comments by John Thompson. See *id.*; see also *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999) [hereinafter *Cureton I*]. For a discussion of *Cureton I*, see *infra* notes 105-20 and accompanying text.

7. See Fullinwider, *supra* note 2.

8. 288 F.3d 548 (3d Cir. 2002).

9. See *id.*; see also Kay Hawes, *From Restricted Earnings to Initial Eligibility, Many Off-the-Court Issues Ended Up in Court*, at <http://www.ncaa.org/news/1999/19991220/active/3626n24.html> (Dec. 20, 1999) (noting there have been several cases stemming from Proposition 16).

10. See *Pryor*, 288 F.3d at 556 (discussing contents of memorandum from NCAA and stating that Proposition 16 has led to increase in graduation rates for minorities and no other model would achieve this goal); see also Nathan Hunt, Note, *Cureton v. NCAA: Fumble! The Flawed Use of Proposition 16 by the NCAA*, 31 U. Tol. L. Rev. 273, 282 (2000) (explaining Proposition 16 was intended to further academic success goals of Proposition 48).

11. See *Pryor*, 288 F.3d at 556 (detailing plaintiffs' allegations that NCAA proceeded with Proposition 16 despite knowing there would be adverse affects on black student-athletes).

and 42 U.S.C. § 1981 (“§ 1981”).¹² The Third Circuit ruled that the plaintiffs’ allegations were sufficient to survive a motion to dismiss.¹³

In 1999, the Third Circuit held that the discrimination theory of disparate impact could not prevail against the NCAA.¹⁴ This holding greatly hindered discrimination suits against the NCAA because it limited the available theories on which discrimination cases may be based.¹⁵ In *Pryor*, the Third Circuit reopened possibilities for plaintiffs to sue the NCAA for discrimination.¹⁶ Although the court did not settle the dispute, the opinion does suggest that purposeful discrimination suits may succeed against the NCAA in the future.¹⁷

This Note focuses on the *Pryor* decision and analyzes its holding. Section II provides a detailed discussion of the factual underpinnings of the *Pryor* case.¹⁸ Section III introduces the NCAA and examines its initial eligibility requirements.¹⁹ Section III also discusses Title VI and § 1981, concluding with a brief description of relevant case law.²⁰ Section IV explains the Third Circuit’s reasoning and analyzes this reasoning in light of relevant statutes and case law.²¹ Section V discusses the potential effect this case will have on future challenges to NCAA requirements.²²

12. See *id.* (citing basis of claims); see also 42 U.S.C. § 2000d (1964); 42 U.S.C. § 1981 (2000). For a further discussion of Title VI of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981, see *infra* notes 95-104 and accompanying text.

13. See *Pryor*, 288 F.3d at 570 (stating court remanded case on two allegations).

14. See *Cureton I*, 198 F.3d 107, 115 (3d Cir. 1999) (holding that regulations prohibiting disparate impact discrimination applied only to specific programs receiving federal financial assistance).

15. See *id.*

16. See *Pryor*, 288 F.3d at 561 (reversing dismissal of claim for purposeful discrimination).

17. See *id.* at 570 (remanding case to district court).

18. For a discussion of the facts surrounding the Third Circuit’s holding in *Pryor*, see *infra* notes 23-49 and accompanying text.

19. For a discussion of the NCAA and its eligibility requirements, see *infra* notes 50-94 and accompanying text.

20. For a discussion of the background information regarding the NCAA and the statutory and judicial framework concerning intentional discrimination, see *infra* notes 95-120 and accompanying text.

21. For a discussion of the *Pryor* court’s analysis, see *infra* notes 121-82 and accompanying text.

22. For a discussion on the potential impact of the *Pryor* decision, see *infra* notes 183-93 and accompanying text.

II. FACTS: KELLY PRYOR AND WARREN SPIVEY STEP UP TO THE LINE OF SCRIMMAGE

Pryor v. NCAA is the most recent challenge to the NCAA's initial eligibility qualifications enumerated in Proposition 16, which took effect in 1996.²³ Kelly Pryor and Warren Spivey, both African-Americans, were recruited to play varsity athletics at national universities in 1999.²⁴ While still a senior in high school, Pryor signed a national letter of intent ("NLI") to play varsity soccer at San Jose State University beginning the following school year.²⁵ Spivey signed an NLI to play football at the University of Connecticut.²⁶ Both plaintiffs would be recipients of athletic scholarships from their respective schools.²⁷

Pursuant to NCAA regulations, all students who are to receive athletic scholarships must meet certain conditions.²⁸ These conditions are encompassed by the eligibility requirements instituted by Proposition 16, which governs athletic participation in colleges and universities.²⁹ If the requirements are not met, the NLI agreement is void and the student-athlete cannot participate in varsity athletics and cannot receive athletic scholarships.³⁰ Pryor and Spivey were

23. See *Pryor*, 288 F.3d at 553-54 (discussing other cases challenging NCAA's eligibility requirements, such as *NCAA v. Tarkanian*, 488 U.S. 179 (1988), *Cureton v. NCAA*, 252 F.3d 267 (3d Cir. 2001) [hereinafter *Cureton II*], and *Cureton I*, 198 F.3d 107 (3d Cir. 1999)).

24. See *id.* at 554 (stating race of plaintiffs, which is primary source of plaintiffs' claims).

25. See *id.* at 554-55 (explaining Pryor signed NLI, which directly relates to § 1981 claim). NLIs are contracts between student-athletes, the NCAA, and the educational institution the student-athletes plan to attend. See *id.* at 555. Section 1981 involves the freedom to make and enforce contracts. See NCAA, *Frequently-Asked Questions on the National Letter of Intent/Financial Aid*, at http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/nli_financial_aid.html (last visited Mar. 9, 2003):

The [NLI] is a binding agreement between a prospective student-athlete and an institution in which the institution agrees to provide a prospective student-athlete who is admitted to the institution and is eligible for financial aid under NCAA rules athletics aid for one academic year in exchange for the prospect's agreement to attend the institution for one academic year.

Id.

26. See *Pryor*, 288 F.3d at 555 (detailing Warren Spivey's agreement to play football for university).

27. See *id.* (stating both plaintiffs were to receive athletic scholarships subject to fulfillment of eligibility requirements).

28. See *id.* ("[T]he NLIs signed by Pryor and Spivey contain a condition that would render the agreement void if they failed to meet the eligibility requirements established in Proposition 16.").

29. See *id.* For a further discussion of Proposition 16, see *infra* notes 81-91 and accompanying text.

30. See *Pryor*, 288 F.3d at 555 (explaining conditional requirements of NLIs).

both unable to fulfill the Proposition 16 requirements.³¹ Pryor petitioned the NCAA for “partial qualifier” status due to a learning disability.³² The NCAA granted the petition, permitting Pryor to keep her scholarship and to practice with her team.³³ She could not, however, compete in games or competitions.³⁴

In February 2000, Pryor and Spivey sued the NCAA in the United States District Court for the Eastern District of Pennsylvania.³⁵ Pryor brought suit under the Americans with Disabilities Act (ADA) and the Rehabilitation Act.³⁶ Spivey joined with Pryor to bring suit for intentional discrimination under Title VI and § 1981.³⁷ Pryor and Spivey admitted in their complaint that the purported goal of Proposition 16 was to improve graduation rates among black student-athletes.³⁸ Yet, they asserted that Proposition 16 actually rendered an increased number of African-American athletes ineligible to participate in intercollegiate athletics and receive scholarships.³⁹ The plaintiffs further alleged the NCAA knew of and intended these effects.⁴⁰ In its response, the NCAA stated that the purpose of Proposition 16 was “laudable” and had no malignant intent towards minority student-athletes.⁴¹

31. *See id.* (stating both Pryor and Spivey failed to qualify for eligibility under Proposition 16, thus voiding their NLIs).

32. *See id.* Pryor could also “earn back” her year of missed eligibility according to an NCAA bylaw. *See id.*; *see also* NCAA Division I Bylaw 14.3.3.2 (describing how students with learning disabilities can earn back fourth season of eligibility). The University of Connecticut appealed to the NCAA on behalf of Spivey, yet the petition and its appeal were both denied. *See Pryor*, 288 F.3d at 555. For a further discussion of partial qualification, *see infra* notes 87-90 and accompanying text.

33. *See Pryor*, 288 F.3d at 555 (listing benefits of partial qualifier status over non-qualifier status).

34. *See id.* (explaining limitations on partial qualifiers).

35. *See id.*

36. *See id.*; *see also* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (2000) (ensuring equal protection for disabled Americans); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794(e) (2000) (providing rehabilitation services to improve health of mothers and children).

37. *See Pryor*, 288 F.3d at 555. For a discussion of Title VI and § 1981, *see infra* notes 95-104 and accompanying text.

38. *See Pryor*, 288 F.3d at 552 (establishing Proposition 16 as facially neutral rule with goal of improving graduation rates).

39. *See id.* (stating plaintiff’s complaint enunciated negative effects of Proposition 16).

40. *See id.* (explaining why cause of action for purposeful discrimination is proper).

41. *See id.* at 552, 559 (explaining that NCAA’s admission of trying to help African-American athletes rebuts inference that it is discriminating against them). The NCAA moved for dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative summary judgment at the pleading stage and prior to any discovery. *See id.* at 556; *see also* FED. R. Civ. P. 12(b)(6).

The district court dismissed Pryor's claims under the ADA and Rehabilitation Act citing a lack of "ripeness."⁴² The court proceeded to dismiss both plaintiffs' theories of purposeful discrimination.⁴³ The theory of "deliberate indifference" could not stand because Title VI did not provide a remedy, and the § 1981 claim was dismissed because the plaintiffs failed "to adequately allege intentional discrimination and this deficiency merit[ed] dismissal of the [§ 1981] claim."⁴⁴

The plaintiffs appealed the dismissal to the Third Circuit in 2002.⁴⁵ The issue before the court was whether the plaintiffs had "stated a claim for purposeful, racial discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. and 42 U.S.C. § 1981, by alleging that the NCAA adopted certain standards because of their adverse impact on black student athletes seeking college scholarships."⁴⁶ The Third Circuit reversed in part and affirmed in part.⁴⁷ The court held that the plaintiffs had a sufficient claim for purposeful discrimination under Title VI and § 1981.⁴⁸ The Third Circuit, however, affirmed the district court's dismissal of the ADA and Rehabilitation Act claims for lack of ripeness.⁴⁹

III. BACKGROUND

A. The NCAA

The NCAA is the principal governing body of intercollegiate athletics in the United States.⁵⁰ It began as the Intercollegiate Ath-

42. See *Pryor*, 288 F.3d at 557. The court concluded that Pryor's claim was not ripe because she could still receive relief from NCAA according to Bylaw 14.3.3.2. See *id.*; see also NCAA Division I Bylaw 14.3.3.2 (clarifying learning disability loophole). If Pryor completed seventy-five percent of her degree requirements, she could receive a year of eligibility in her fifth year. See *id.*

43. See *Pryor*, 288 F.3d at 557 (explaining dismissal of two theories of purposeful discrimination).

44. *Id.*

45. See *id.*

46. See *id.* at 552 (discussing issues raised before Third Circuit).

47. See *id.* at 570 (stating court's final decree).

48. See *Pryor*, 288 F.3d at 570 (citing two of plaintiffs' claims to be heard by trial court).

49. See *id.* (explaining Pryor's claims would not be heard because she may still acquire relief through NCAA).

50. See *What Is the NCAA?*, at http://www.ncaa.org/about/what_is_the_ncaa.html (last visited Mar. 9, 2003) (noting NCAA is dedicated to administration of intercollegiate athletics); see also *National Collegiate Athletic Purposes Are*, at <http://www.ncaa.org/about/purposes.html> (last visited Mar. 9, 2003) [hereinafter *NCAA Purposes*]. One of the purposes of the NCAA is "[t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of the Association." *Id.* Another purpose of the

letic Association of the United States ("IAAUS") in 1906, and took the name National Collegiate Athletic Association in 1910.⁵¹ The NCAA is a "voluntary association of about 1,200 college and universities, athletic conferences and sports organizations."⁵² Its member institutions are divided into three separate groups: Division I, Division II, and Division III.⁵³ These divisions exist for purposes of by-law legislation and equality among the members of intercollegiate athletic competition.⁵⁴ Each division adopts its own bylaws, which are only applicable within the particular division, while a number of regulations apply to the membership as a whole.⁵⁵

NCAA is "[t]o legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics." *Id.*; see also *NCAA Governance at a Glance*, at http://www1.ncaa.org/membership/governance/org_chart.html (last visited Mar. 9, 2003) (illustrating NCAA governance hierarchy).

51. ARTHUR A. FLEISHER III ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION* 38-39 (1992). The NCAA was founded to combat increasing levels of violence in college football. See *id.* at 38. The original purpose of the NCAA was to "reduc[e] violence and standardiz[e] play." See *id.* at 40; see also *History of the NCAA: It Was the Flying Wedge, Football's Major Offense in 1905, That Spurred the Formation of the NCAA*, at <http://www.ncaa.org/about/history.html> (last visited Mar. 9, 2003). It was not until 1921, when the first national championship was held, that the NCAA progressed further than "a discussion group and rules-making body." See *id.*

52. *What Is the NCAA?*, *supra* note 50 (citing number of organizations involved in NCAA); see also *Composition of the NCAA*, at http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Mar. 9, 2003) (listing number and types of members as of September 1, 2002).

53. See *What's the Difference Between Divisions I, II and III?*, at http://www.ncaa.org/about/div_criteria.html (last visited Mar. 9, 2003). Each division has its own criteria that must be met in order for a member institution to qualify as part of that division. See *id.* Division I schools, for instance, must sponsor a minimum of seven sports for each gender. See *id.* Division I members also must meet certain financial aid award limits and criteria for scheduling contests and attendance. See *id.* Division II institutions must sponsor a minimum of four sports for both genders. See *id.* Division III schools must sponsor at least five sports for both genders. See *id.* In contrast to the other divisions, Division III student-athletes do not receive athletic scholarships. See *id.*

54. See *NCAA v. Tarkanian*, 448 U.S. 179, 183 (1988) (explaining governance of member institutions by NCAA). "Basic policies of the NCAA are determined by the members at annual conventions. Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs." *Id.* The NCAA has adopted rules, called legislation, governing its member institutions. See *id.* These legislations apply to many issues, such as academic eligibility standards, financial aid, and recruitment. See *id.*

55. See *Pryor v. NCAA*, 288 F.3d 548, 553 (3d Cir. 2002) (discussing how each division adopts its own bylaws including rules for freshmen eligibility); see also *Cureton v. NCAA*, 37 F. Supp. 2d 687, 715-16 (E.D. Pa. 1999) (focusing on promulgation of bylaw affecting eligibility in members of Division I only).

B. NCAA Eligibility Guidelines

One of the primary functions of the NCAA is the establishment of requirements concerning athletic scholarships, recruiting, and academic eligibility of incoming freshman athletes.⁵⁶ The NCAA has sought to preserve the integrity of both academic institutions and intercollegiate athletics by imposing eligibility guidelines that are “designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student athletes.”⁵⁷

In 1965, the NCAA enacted the “1.6 Rule,” its first attempt at creating uniform eligibility requirements for freshman athletes.⁵⁸ This rule sought to predict whether the entering student-athlete would be able to earn a first-year grade point average (GPA) of 1.6 or better.⁵⁹ This projection was made through the use of prediction tables and formulas combining the student’s high school GPA and his or her score on either the Scholastic Aptitude Test (SAT) or American College Test (ACT).⁶⁰ Failure to meet the benchmark level necessary to predict a GPA of 1.6 rendered the student-athlete ineligible to participate in collegiate athletics during his or her freshman year.⁶¹

56. See *NCAA Purposes*, *supra* note 50 (elaborating on NCAA purposes and goals). Above all, “the NCAA strives to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.” *Id.*

57. Tyler J. Murray, Note, *Illegalizing the NCAA’s Eligibility Rules: Did Cureton v. NCAA Go Too Far, or Not Far Enough?*, 26 J. LEGIS. 101, 102-03 (2000) (quoting NCAA Constitution).

58. See Nathan Hunt, *supra* note 10, at 278-79 (describing institution of “1.6 Rule” after failure of “sanity code”). The “sanity code” sought to govern eligibility by banning all athletic scholarships. See *id.* at 278; see also Michael J. Mondello & Amy M. Abernathy, *An Historical Overview of Student-Athlete Academic Eligibility and the Future Implications of Cureton v. NCAA*, 7 VILL. SPORTS & ENT. L.J. 127, 128 (2000) (explaining academic standards for athletes declined during early 1970s after institution of “1.6 Rule”); Murray, *supra* note 57, at 103 (illustrating “1.6 Rule” as first attempt to fulfill NCAA’s mission).

59. See Hunt, *supra* note 10, at 278-79 (discussing “1.6 Rule’s” objective in predicting freshman GPA); see also Mondello & Abernathy, *supra* note 58, at 128 (explaining some athletic conferences required additional minimum scores); Murray, *supra* note 57, at 103 (elaborating on “1.6 Rule” and its purpose).

60. See Hunt, *supra* note 10, at 278-79 (describing formula prediction tables); see also Murray, *supra* note 57, at 103 (expanding on formulas used to determine whether 1.6 GPA can be met).

61. See Hunt, *supra* note 10, at 279 (explaining violation of this rule confronted colleges and universities with possibilities of sanctions); see also Murray, *supra* note 57, at 103 (stating student-athletes were able to re-qualify following freshman year).

The “1.6 Rule” was repealed in 1973 and replaced with the “2.0 Rule.”⁶² This new rule removed the standardized test score from consideration in determining eligibility.⁶³ It also disposed of the convoluted prediction formulas used in the “1.6 Rule.”⁶⁴ Instead, the new rule required student-athletes to attain a high school GPA of 2.0 or higher in order to be eligible to participate in collegiate athletics.⁶⁵ This rule generated much reservation among NCAA officials over the lack of uniformity in high school grading procedures.⁶⁶ Many feared that the new rule would lead to an abuse of the system, whereby high school faculties would pass unqualified athletes.⁶⁷

Public outcry and scandal during the 1980s provoked the NCAA to change its eligibility requirements for college athletes once again.⁶⁸ In 1986, the NCAA implemented Proposition 48.⁶⁹ Proposition 48 sought to accomplish two goals:

First, an emphasis was placed on increasing the graduation rate of those student-athletes specifically competing in the revenue-generating sports of football and men’s

62. See Hunt, *supra* note 10, at 279 (noting that after only eight years, “1.6 Rule” was repealed and replaced with more stringent “2.0 Rule”); see also Murray, *supra* note 57, at 103 (explaining that regardless of eligibility, any student-athlete could receive athletic scholarships).

63. See Hunt, *supra* note 10, at 279 (explaining GPA was sole requirement for eligibility); see also Murray, *supra* note 57, at 103 (stating controversial standardized test scores were removed from consideration for eligibility).

64. See Hunt, *supra* note 10, at 279 (noting praise for removal of confusing formulas).

65. See *id.* (explaining sole requirement of earning GPA of 2.0 upon graduation from high school); see also Murray, *supra* note 57, at 103 (explaining that GPA of 2.0 was sole requirement as of 1973 amendments).

66. See Hunt, *supra* note 10, at 279 (discussing fear of NCAA officials over lack of uniformity in grading procedures throughout country).

67. See *id.* (stating despite concerns and mounting scandal, NCAA continued to use “2.0 Rule”).

68. See *id.* (discussing scandals involving exploitation of athletes and increasing public perception that athletes were not academically qualified); see also Mondello & Abernathy, *supra* note 58, at 129 (explaining “dumb jock” image, recruitment scandals, and academic exploitation caused NCAA to institute new standards). “A consensus among researchers developed that student-athletes, especially minority student-athletes, were being exploited for their athletic talent while their academic endeavors were being pushed aside.” *Id.*; see also Murray, *supra* note 57, at 103 (noting scandals and poor graduation rates forced NCAA to re-evaluate its standards).

69. See Hunt, *supra* note 10, at 279 (maintaining Proposition 48 was implemented to establish uniform eligibility policy designed to increase academic proficiency). Unlike its predecessors, “Proposition 48 set forth legitimate academic eligibility requirements for NCAA student athletes.” *Id.*; see also Murray, *supra* note 57, at 104 (stating Proposition 48 was instituted to stiffen eligibility requirements).

basketball. Second, efforts were made to ensure that student-athletes were not being counseled into courses primarily designed to safeguard their eligibility with little or no concern for their progress toward graduation.⁷⁰

Proposition 48 compelled high school athletes to attain a GPA of at least 2.0 in eleven core academic courses and score at least a 700 on the SAT or 15 on the ACT.⁷¹

Proposition 48 also introduced the notion of qualifiers and partial qualifiers.⁷² Qualifiers were those student-athletes who met the Proposition 48 standards and thus could compete in collegiate athletics and receive athletic scholarships.⁷³ Partial qualifiers were student-athletes who fulfilled only one of the two academic requirements of Proposition 48.⁷⁴ These student-athletes could receive athletic scholarships, but could not participate in collegiate athletics during freshman year.⁷⁵ The ban was lifted after the partial qualifier's first year, provided the athlete was in good academic standing at that time with his or her college or university.⁷⁶

The controversy surrounding the NCAA's enactment of Proposition 48 continued after its adoption.⁷⁷ Proposition 48 support-

70. Mondello & Abernathy, *supra* note 58, at 130-31.

71. See FLEISHER ET AL., *supra* note 51, at 61 (elaborating on Proposition 48); see also Hunt, *supra* note 10, at 280 (emphasizing requirements of Proposition 48); Mondello & Abernathy, *supra* note 58, at 131 (illustrating requirements of Proposition 48); Murray, *supra* note 57, at 104 (listing required courses needed to complete as condition for eligibility). To be considered for eligibility, a student must complete courses in English, mathematics, natural sciences, and social sciences. See *id.*

72. See FLEISHER ET AL., *supra* note 51, at 61 (expanding on difference between qualifiers and partial qualifiers); see also Hunt, *supra* note 10, at 280 (noting difference between qualifiers and partial qualifiers).

73. See FLEISHER ET AL., *supra* note 51, at 61 (clarifying that freshman qualifiers were eligible for financial aid and could practice and compete for four years); see also Hunt, *supra* note 10, at 280 (distinguishing requirements for full versus partial qualifier status).

74. See FLEISHER ET AL., *supra* note 51, at 61 (explaining that partial qualifiers were those who met 2.0 GPA requirement but did not achieve other requirements); see also Hunt, *supra* note 10, at 280 (stating partial qualifiers fulfilled only one of Proposition 48's two requirements).

75. See FLEISHER ET AL., *supra* note 51, at 61 (describing how partial qualifiers could receive "institutional" financial aid, but could not practice or play for school during freshman year). A partial qualifier loses one year of eligibility. See *id.*; see also Hunt, *supra* note 10, at 280 (describing status of partial qualifiers).

76. See Hunt, *supra* note 10, at 280 (explaining partial qualifier status and ability of partial qualifier to gain full status after first year).

77. See *id.* Opponents of the standards argued that they were too high and caused a disparate impact on minority athletes. See *id.* "Of those athletes declared ineligible, 84% of the football players and 92% of the basketball players were African-American." *Id.*; see also FLEISHER ET AL., *supra* note 51, at 61-2 (citing criticism

ers hailed it as a success by citing rising graduation rates and the increased credibility of student-athletes.⁷⁸ Critics of the requirements were concerned “that Proposition 48 ha[d] a disparate impact on minority athletes.”⁷⁹ Opponents of the new requirements relied on a 1990 study conducted by the Knight Commission, which concluded that eighty-six percent of the athletes harmed by Proposition 48 were African-American.⁸⁰

In an effort to strengthen Proposition 48, the NCAA introduced Proposition 16.⁸¹ Proposition 16 took effect in 1996 and provides the eligibility requirements that are in operation today.⁸² Proposition 16 altered previous eligibility requirements by increasing the number of required core high school classes from eleven to thirteen and by raising the minimum high school GPA from 2.0 to 2.5.⁸³ Proposition 16 also implemented a “sliding scale” or index enabling the prospective freshmen to balance a lower GPA with a higher SAT or ACT score.⁸⁴ Thus, a student with a minimum GPA of 2.0 must earn an SAT score of 1010, while a student with a 2.5 GPA or higher qualifies with the minimum qualifying SAT score of

focused on racial bias); *see also* Mondello & Abernathy, *supra* note 58, at 134-35 (discussing argument that SAT scores are poor indicators of success).

78. *See* Hunt, *supra* note 10, at 281 (discussing support of Proposition 48); *see also* Mondello & Abernathy, *supra* note 58, at 132 (proclaiming proponents’ claim that Proposition 48 was successful).

79. Hunt, *supra* note 10, at 280 (pointing to large percentage of African-Americans as being ineligible athletes after rule’s implementation).

80. *See id.* The Knight Commission, a Miami-based philanthropic organization, conducted a study in 1990 on the effects of Proposition 48. *See id.*

81. *See* Mondello & Abernathy, *supra* note 58, at 135 (stating two ways Proposition 16 strengthened Proposition 48).

82. *See* Hunt, *supra* note 10, at 281 (stating Proposition 16 is still in effect today); *see also* Mondello & Abernathy, *supra* note 58, at 135 (explaining how Proposition 48 was revised into Proposition 16 at 1992 convention, but was not instituted until 1996).

83. *See* PHILIP D. GRAYSON, NCAA COLLEGE-BOUND STUDENT-ATHLETE 2 (Michael V. Earle ed., 2002) (setting forth present eligibility requirements for entering student-athletes). The core courses include four years of English, two years of mathematics, two years of science, one additional year of one of the previous three subjects, two years of social science and two years of any additional course. *See id.*

84. *See* Hunt, *supra* note 10, at 281 (describing sliding scale instituted by Proposition 16); *see also* Mondello & Abernathy, *supra* note 58, at 136-37 (introducing “initial eligibility index,” which allowed students to remain eligible by balancing lower GPA with higher SAT score).

820.⁸⁵ A student-athlete will not qualify with an SAT score lower than 820 or a GPA lower than 2.0.⁸⁶

In addition, Proposition 16 modified the classification of partial qualifiers.⁸⁷ A student-athlete who was not eligible under Proposition 16 could be classified as a partial qualifier by having a GPA within the qualifier bracket, but an SAT or ACT score below the minimum levels, or vice versa.⁸⁸ For example, a person with a 2.75 GPA and an SAT score of 810 is considered a partial qualifier because the SAT score is too low to meet qualifier status.⁸⁹ Partial qualifiers cannot compete in athletic competition during their first year, but they can practice with their teams and receive scholarship assistance.⁹⁰ Athletes with an SAT score of less than 720 are designated non-qualifiers by the NCAA and cannot participate in intercollegiate athletics or receive scholarships during freshman year.⁹¹

The NCAA failed to consider the negative impact the increased academic requirements of Proposition 16 would have on minority student-athletes.⁹² Under Proposition 16, less than one-half of all

85. See Hunt, *supra* note 10, at 281. "For every 0.025 drop in GPA, the scale requires an athlete to score ten points higher on the SAT or one point higher on the ACT." *Id.*; see also Mondello & Abernathy, *supra* note 58, at 136-37 (using examples to show intricacies of sliding scale); see also Murray, *supra* note 57, at 104 (indicating interaction between SAT scores and GPA within context of sliding scale).

86. See Hunt, *supra* note 10, at 281 (setting forth minimum score allowed on SAT and minimum GPA, both of which must be offset by higher GPA or SAT score respectively); see also Mondello & Abernathy, *supra* note 58, at 136 (elaborating on minimum SAT and ACT score requirements as well as minimum GPA needed to achieve full qualification).

87. See Hunt, *supra* note 10, at 282 (defining new qualifications for achieving partial qualifier status); see also Mondello & Abernathy, *supra* note 58, at 136 (explaining students not achieving full qualifying status still have opportunity to achieve partial qualifier status).

88. See Hunt, *supra* note 10, at 282 (illustrating that at least one requirement for eligibility had to be within qualifying range in order for student-athlete to achieve partial qualifier status); see also Mondello & Abernathy, *supra* note 58, at 136 (indicating procedure for achieving partial qualifier status).

89. See Hunt, *supra* note 10, at 282 (exemplifying how student-athletes can become partial qualifiers while failing to achieve full qualifying status under Proposition 16); see also Mondello & Abernathy, *supra* note 58, at 136 (noting scores needed to achieve partial qualifier status).

90. See Hunt, *supra* note 10, at 282 (defining confines of partial qualifier status); see also Mondello & Abernathy, *supra* note 58, at 136 (pointing out that while partial qualifiers could not compete in intercollegiate athletics, they could still receive scholarship aid).

91. See Hunt, *supra* note 10, at 282 (explaining that failure to achieve either minimum SAT score or minimum GPA renders student-athlete ineligible to receive athletic scholarship money and to compete in intercollegiate athletics).

92. See *id.* (discussing criticisms of Proposition 16); see also Mondello & Abernathy, *supra* note 58, at 137-38 (citing statistics of how Proposition 16 impacted high school seniors).

African-American college-bound high school seniors met the new eligibility requirements, compared with two-thirds of Caucasian and Asian college-bound seniors.⁹³ This adverse and uneven effect led to much controversy, turmoil, and, eventually, litigation.⁹⁴

C. Purposeful Discrimination, Title VI, and § 1981

To recover under Title VI or § 1981, a plaintiff cannot merely assert Proposition 16 has a disproportionate effect on certain minorities.⁹⁵ There is no private cause of action for disparate impact

93. See Hunt, *supra* note 10, at 282 (pointing out percentage of African-American student-athletes qualifying under new requirements); see also Mondello & Abernathy, *supra* note 58, at 137-38 (elaborating impact that increased standards have had on minority student-athletes' ability to qualify for eligibility).

94. See Hunt, *supra* note 10, at 282-83 (explaining how every eligibility rule has been challenged and how Proposition 16 is no different); see also Mondello & Abernathy, *supra* note 58, at 139 (holding that controversial issues of Proposition 16 are not new and have existed since inception of "1.6 Rule").

95. See 42 U.S.C. § 1981 (2000) (ensuring equal rights under law). Section 1981 provides:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Id.; see also Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964). Title VI provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of . . . (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3).

Id.; see *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir. 1996) (holding facially neutral exemption not adopted with intent to discriminate against women). In *Stehney*, the

of statutory law on minorities.⁹⁶ The Supreme Court ruled that Title VI and § 1981 provide a private cause of action for intentional discrimination only.⁹⁷ Therefore, plaintiffs have to show that the discrimination was intended, and not a mere by-product of the policy to sustain a claim under § 1981 or Title VI.⁹⁸

To prove intentional discrimination by "a facially neutral policy, a plaintiff must show that the relevant decisionmaker adopted the policy at issue 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁹⁹ The mere awareness of the consequences of an otherwise neutral policy will not be sufficient to provide the basis for a Title VI and § 1981 suit.¹⁰⁰

Once purposeful discrimination is established, the policy-maker must show that the policy can survive a test of strict scrutiny.¹⁰¹ That is, the proponent of the policy must show that there was a compelling interest in using a race-based classification and

plaintiff, a mathematician, was fired from the National Security Agency for refusing to take a polygraph test. *See id.* at 928. She contended that the exemption from the polygraph requirement for "world class mathematicians," and not her, violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 937. The court, however, held that there was a rational basis for exempting the mathematicians and dismissed the plaintiff's claim. *See id.*

96. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). "Title VI itself directly reaches only instances of intentional discrimination." *Id.* at 281.

97. *See id.* at 279-80. The plaintiff in *Alexander* brought suit to enjoin the Alabama Department of Public Safety from using English as the only language on the state's driver license exams. *See id.* at 279. He argued that the English-only policy discriminated against him on the basis of his national origin. *See id.* The question presented was whether private citizens can sue under Title VI for disparate impact. *See id.* at 278. The Court held that there was only a private right to sue for intentional discrimination under Title VI and not for disparate impact. *See id.* at 293.

98. *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 (1982) (holding that § 1981 could only be violated by purposeful discrimination). "The complaint sought to redress racial discrimination in the operation of an exclusive hiring hall established in contracts between Local 542 of the International Union of Operating Engineers and construction industry employers doing business within the Union's jurisdiction." *Id.* at 378. The issue in this case was whether proof of discriminatory intent is necessary under § 1981. *See id.*

99. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). In this case, the appellee had been passed over for better jobs despite high test scores due to Massachusetts's veterans preference laws. *See id.* at 264-65. She brought suit for gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 259. The Court held that the veterans preference did not purposely discriminate against women because women could be veterans. *See id.* at 279. Furthermore, the Court identified a test for purposeful discrimination. *See id.*

100. *See id.* (identifying test used to decide whether a policy is discriminatory).

101. *See Shaw v. Reno*, 509 U.S. 630, 643 (1993). Appellants brought suit for unconstitutional racial gerrymandering in the creation of a majority African-American district. *See id.* at 633-34. The Supreme Court held that the appellants had stated a cause of action, but did not rule on its constitutionality because the proper jurisdiction belonged to the United States District Court for the District of Columbia. *See id.* at 657-58.

that the classification is narrowly tailored to achieve that compelling interest.¹⁰²

Before strict scrutiny is applied, however, a plaintiff must show that he or she is entitled to relief under § 1981.¹⁰³ A plaintiff must show: (1) that he or she belongs to a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in § 1981, including the right to make and enforce contracts.¹⁰⁴

D. Past Cases: *Cureton I* and *Cureton II*

At the time of their decisions, the cases known as *Cureton I*¹⁰⁵ and *Cureton II*¹⁰⁶ were heralded as the most significant cases regarding discrimination by the NCAA.¹⁰⁷ Both were tried before the Third Circuit and originate from the same lawsuit, *Cureton v. NCAA*.¹⁰⁸ The plaintiffs were African-American student-athletes who easily exceeded the NCAA GPA requirement, but failed to achieve the necessary SAT score as required by Proposition 16.¹⁰⁹ As a result, the NCAA denied both individuals eligibility to compete in intercollegiate athletics during their freshman years.¹¹⁰

Relying on Title VI, plaintiffs alleged the NCAA's initial eligibility requirements had a disparate adverse impact on African-

102. *See id.* at 658.

103. *See Brown v. Philip Morris, Inc.*, 250 F.3d 789, 794 (3d Cir. 2001). The plaintiffs, African-American smokers, brought a civil rights suit under § 1981 on behalf of all living African-American smokers who had purchased tobacco products from the defendants. *See id.* The court of appeals upheld the district court's dismissal of the case because there was no showing of disparity between the tobacco products sold to the African-American smokers and those sold to others. *See id.* at 797. The court developed a test to establish a right to relief under § 1981. *See id.*

104. *See id.* (providing elements necessary to establish right to relief under § 1981).

105. 198 F.3d 107 (3d Cir. 1999).

106. 252 F.3d 267 (3d Cir. 2001).

107. *See Mondello & Abernathy, supra* note 58, at 148-49 (stating future implications of both *Cureton* decisions).

108. *See Cureton II*, 252 F.3d at 267; *Cureton I*, 198 F.3d at 107.

109. *See Cureton I*, 198 F.3d at 109-10. Cureton ranked twenty-seventh in his class and earned many academic honors. *See id.* at 109. Shaw was ranked fifth in her class and was a member of the National Honor Society. *See id.* at 109-10. Gardner and Wesby also exceeded the minimum GPA requirement enacted by the NCAA. *See id.* at 110.

110. *See id.* (indicating that loss of eligibility was only one consequence of failure to achieve minimum SAT score). Cureton alleged that he was dropped as a recruit from many Division I schools after his failure to meet the SAT requirement. *See id.* at 109. Shaw was given financial aid by her university, but was unable to compete on the track team. *See id.*

American students.¹¹¹ The district court held that Proposition 16's disparate impact on African-American athletes violated Title VI and permanently enjoined the continued enforcement of Proposition 16.¹¹²

The Third Circuit in *Cureton I* reversed and remanded with instructions for the entry of judgment in favor of the NCAA, deciding that the regulations applied only to the specific programs or activities for which an entity uses federal funds, and not to the entity at large.¹¹³ Therefore, Title VI did not apply to the NCAA because it did not exercise controlling authority over its member institutions' ultimate decision about a student athlete's eligibility to participate in college athletics.¹¹⁴ Contrary to the theory alleged by the plaintiffs in *Cureton I*, the Supreme Court thereafter held that Title VI did not create a claim for disparate impact in *Alexander v. Sandoval*.¹¹⁵ Title VI only reached instances of intentional discrimination by a covered entity.¹¹⁶

On remand to the district court, the *Cureton I* plaintiffs moved to either amend their complaint or to have the judgment altered so as to add a claim of intentional discrimination based on the NCAA's adoption or enforcement of Proposition 16.¹¹⁷ The district court denied the motion on grounds of prejudice, delay, and futility.¹¹⁸ Again before the Third Circuit, in *Cureton II*, the court af-

111. See *id.* at 111 (explaining Title VI prohibits exclusion or discrimination based on race, color, or national origin by any program receiving federal assistance). The NCAA moved to dismiss the complaint, or in the alternative, for summary judgment stating that there was no private right of action for unintentional discrimination under Title VI and that the NCAA was not subject to Title VI because it did not receive federal funds. See *id.* The plaintiffs, in turn, moved for partial summary judgment. See *id.*

112. See *id.* at 111-12. The district court cited two theories in support of its conclusion that the NCAA was subject to the prohibitions of Title VI. See *id.* First, the court found that the NCAA was an "indirect recipient of federal financial assistance." See *id.* at 111. Second, the court held that Title VI covered the NCAA because it has controlling authority over its member institutions that receive federal funds. See *id.* at 112.

113. See *id.* at 115 (expanding on court's reasoning regarding Title VI coverage).

114. See *Cureton I*, 198 F.3d at 116-17. The dues paid to the NCAA by its members were not paid by federal funds. See *id.* at 116. The ultimate decision to either accept or reject a student rested with the educational institution. See *id.* at 117.

115. 532 U.S. 275 (2001). For further a discussion of the Supreme Court's decision in *Alexander*, see *supra* notes 96-97 and accompanying text.

116. See *Alexander*, 532 U.S. at 281 (analyzing precedent in holding that Title VI only reaches intentional discrimination).

117. See *Cureton II*, 252 F.3d 267, 269 (3d Cir. 2001) (citing district court's decision to deny plaintiffs' motion to amend).

118. See *id.* at 273-74. The district court gave four reasons for the denial of plaintiff's motion: the three-year wait between filing of complaint and the motion;

firmed dismissal on grounds of prejudice and delay only, concluding that allowing the plaintiffs to amend their complaint would require the NCAA to relitigate the entire case.¹¹⁹ The plaintiffs, in turn, admitted that they could have filed an intentional discrimination claim in the beginning, but had chosen not to do so.¹²⁰

IV. ANALYSIS

The plaintiffs in *Pryor* made several claims against the NCAA under Title VI, § 1981, the ADA, and the Rehabilitation Act.¹²¹ The court addressed each claim, deciding whether the plaintiffs had established a claim for relief based on the pleadings.¹²² The court emphasized that because its review was at the pleading stage, it could not render findings of fact in this case.¹²³ Initially, the court reviewed Pryor's claim under the ADA and Rehabilitation Act.¹²⁴ It subsequently addressed the allegations of purposeful discrimination and deliberate indifference made under Title VI and § 1981.¹²⁵

A. ADA and Rehabilitation Act

1. *The District and Appellate Courts "Block" the Claims*

The district court found Pryor's claim under the ADA and Rehabilitation Act inappropriate at the time due to a "lack of redress and lack of ripeness."¹²⁶ The district court reasoned that because

the two-and-a-half-year knowledge of the information necessary to file the motion; the effect on judicial efficiency; and the interest of finality. *See id.*

119. *See id.* at 273-74, 276. The length of time between the complaint and motion alone does not require a denial on the grounds of delay. *See id.* at 273. At some point, delay becomes "undue." *See id.* The undue delay will become either a burden on the court or prejudicial to the opposing party. *See id.*

120. *See id.* at 271 ("Plaintiffs acknowledge that they considered moving to amend their complaint to allege intentional discrimination . . . , [but] plaintiffs made a tactical decision not to . . .").

121. *See Pryor v. NCAA*, 288 F.3d 548, 552 (3d Cir. 2002) (noting various claims of racial discrimination by plaintiffs).

122. *See id.* at 552-53 ("In this close and complex appeal, we must decide whether Plaintiffs have stated a claim for purposeful, racial discrimination . . . by alleging that the [NCAA] adopted certain educational standards because of their adverse impact on black student athletes seeking college scholarships[, and w]e hold that they have . . .").

123. *See id.* at 566 (explaining no discovery had been conducted at time of appeal).

124. *See id.* at 560-62 (laying out appellate court's reasoning for rejection of ADA and Rehabilitation claims).

125. *See id.* at 562-70 ("We address [purposeful discrimination] first and Plaintiffs' 'deliberate indifference' theory thereafter.").

126. *See Pryor*, 288 F.3d at 557. Because Pryor could recover her fourth year of eligibility, there were no legal or equitable forms of relief available to her. *See id.*

Pryor could still gain relief from the NCAA under its bylaws, bringing the action prior to the exhaustion of such relief was improper and failed for lack of ripeness.¹²⁷ The court explained that Pryor could still “earn back” her lost year of eligibility in 2003, and thus the action would not be viable until after that time.¹²⁸

The appellate court upheld both the reasoning and holding of the district court.¹²⁹ It further highlighted that Pryor had no claim for damages under the ADA because her partial qualifier status allowed her to receive an athletic scholarship.¹³⁰ Moreover, Pryor had not yet lost her fourth year of eligibility.¹³¹ The NCAA provides in its bylaws that learning-disabled athletes can “earn back” a fourth year of eligibility by completing seventy-five percent of their degree requirements by the end of their fourth year.¹³² Pryor will not enter her fourth year of potential eligibility until 2003.¹³³ Provided she meets the eligibility requirements at that time, she will receive her lost year of eligibility as well as the relief she sought in this case under both the ADA and the Rehabilitation Act.¹³⁴ According to the court, because Pryor did not have constitutional standing for these claims, it did not need to address them.¹³⁵

127. *See id.* (outlining district court's decision regarding Pryor's ADA and Rehabilitation Act claims).

128. *See id.* (“[W]hile Pryor's complaint satisfied the constitutional standing requirements of injury and causation, it did not meet the third prong concerning legal and equitable redress.”).

129. *See id.* at 561-62 (upholding dismissal of Pryor's ADA and Rehabilitation Act claims). The court found that it could not yet determine if Pryor would receive her fourth year of eligibility. *See id.* at 561.

130. *See id.* (“[B]ecause we can only speculate that Pryor may someday lose a fourth year of eligibility based on some future event, *i.e.*, the failure to meet 75% of her degree requirements by the end of her fourth year . . . no constitutional standing lies over Pryor's . . . claims.”).

131. *See Pryor*, 288 F.3d at 561 (explaining NCAA bylaws allow learning-disabled athletes ability to regain lost fourth year of eligibility by fulfilling certain requirements by fourth year).

132. *See id.* (outlining requirements necessary for learning-disabled athletes to regain lost year of eligibility); *see also Disability Services Certification and Waiver Process*, at http://www.ncaa.org/databases/regional_seminars/guide_rules_compliance/eligibility/elig_03.html (last visited Mar. 20, 2003) (explaining NCAA Division I Bylaw 14.3.3.2 and how learning-disabled students can earn back fourth season of eligibility).

133. *See Pryor*, 288 F.3d at 561 (stating Pryor's ability to earn back her fourth year of athletic eligibility will not be determined until 2003).

134. *See id.* at 561-62 (explaining Pryor is doing well academically and is projected to fulfill necessary requirements).

135. *See id.* at 562 (reasoning because Pryor's future eligibility was based purely on speculation, appellate court went no further in determination of ADA and Rehabilitation Act claims).

2. *No Pass Interference Declared by the Referee or the Critics*

Both the district and appellate courts' rulings on Pryor's ADA and Rehabilitation Act claims were consistent with each other and with past precedent.¹³⁶ Pryor had not exhausted her options for relief—she still could receive relief from the NCAA itself.¹³⁷ Therefore, her claim had not ripened to the point that a court would be justified in granting her relief.¹³⁸

B. Purposeful Discrimination

1. *District Court Fumbles, "Ball" Picked Up by Appellate Court*

The main focus of the appellate court's opinion concerned both the Title VI and § 1981 claims.¹³⁹ The Third Circuit found that the allegations set forth in the plaintiffs' complaint were sufficient to withstand a motion to dismiss.¹⁴⁰ The court remanded these claims for further proceedings.¹⁴¹

Under the Title VI and § 1981 claims, the plaintiffs asserted two theories of relief.¹⁴² The first theory was purposeful discrimination; the second was deliberate indifference.¹⁴³ In reaching its deci-

136. *See id.* at 557, 562 (showing consistencies of district court and appellate court rulings concerning eligibility requirements).

137. *See id.* at 552. Pryor irrevocably lost her freshmen year eligibility, but if she maintains her academics, the NCAA can award her that lost year after her fourth year at college. *See id.* This is contingent upon her completion of seventy-five percent of her degree requirements by that time. *See id.*

138. *See Pryor*, 288 F.3d at 552. Because Pryor had not exhausted her options for relief, she failed the Constitution's "case or controversy" requirement for ripeness. *See id.*

139. *See id.* at 560-70 (detailing court's ruling on Title VI and § 1981 claims).

140. *See id.* at 564 (deciding plaintiffs sufficiently stated claim for purposeful discrimination after judging pleadings on their face). According to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court may affirm the judgment only if it appears beyond any doubt that no set of facts would entitle the plaintiffs to relief. *See id.*; *see also* FED. R. CIV. P. 12(b)(6). In judging a motion to dismiss, the court must refer to the pleadings in a light most favorable to the plaintiffs. *See Pryor*, 288 F.3d at 559.

141. *See Pryor*, 288 F.3d at 570. The appellate court remanded the Title VI and § 1981 claims back to the district court for a trial on the merits. *See id.*

142. *See id.* at 560 (allowing arguments on "deliberate indifference" and "purposeful discrimination" theories).

143. *See id.* (maintaining purposeful discrimination is key element of Title VI and § 1981 claims and rejecting disparate impact theory in favor of purposeful discrimination). There is only a private right of action allowed under purposeful discrimination. *See id.* Title VI and § 1981 do not allow a private right of action for disparate impact. *See id.*

sion, the court rejected the theory of deliberate indifference, while upholding the claim of purposeful discrimination.¹⁴⁴

The court first addressed the plaintiff's claim of purposeful discrimination.¹⁴⁵ To reach its decision, the court employed judicial guidelines to confirm if indeed intentional discrimination by a facially neutral policy was established sufficiently, enabling the claim to survive a motion to dismiss.¹⁴⁶

To recover under the theory of intentional discrimination, the plaintiffs could not simply allege that Proposition 16 had a disproportionate effect on minorities.¹⁴⁷ Pryor and Spivey had to prove that the NCAA adopted Proposition 16 intentionally to impose adverse effects upon African-American student-athletes.¹⁴⁸ According to the appellate court, the complaint and accompanying exhibits sufficiently showed that the NCAA expressly considered race when it adopted Proposition 16.¹⁴⁹ The NCAA explicitly stated that one of the major goals of Proposition 16 was to increase the graduation rates of African-American athletes relative to white athletes.¹⁵⁰ The complaint also alleged the NCAA instituted Proposition 16 by relying on studies and reports that showed that the increased academic requirements would "screen out" the number of African-American athletes who would meet the standards.¹⁵¹

144. *See id.* (explaining why court reasoned "purposeful discrimination" is proper theory in case as opposed to "disparate impact").

145. *See id.* at 564 (explaining review of "purposeful discrimination" under Rule 12(b)(6) of Federal Rules of Civil Procedure standard).

146. *See Pryor*, 288 F.3d at 564-65. At this point, the court only had the pleadings and the attached exhibits from which to base its decision. *See id.* As with any motion to dismiss, the pleadings had to be judged in the light most favorable to the plaintiffs. *See id.*

147. *See Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir. 1996). For a further discussion of *Stehney*, see *supra* note 95 and accompanying text.

148. *See Pryor*, 288 F.3d at 562 (explaining for intentional discrimination, plaintiffs must prove NCAA enacted Proposition 16 with purpose of harming African-Americans).

149. *See id.* at 564 (citing allegations made in complaint). The plaintiffs' complaint cited NCAA memoranda and other evidence presented in the *Cureton* trial. *See id.* at 555. It also mentioned an interrogatory answered by the NCAA identifying a goal that Proposition 16 would narrow the "Black/White Gap" between African-American graduation rates and white graduation rates. *See id.*

150. *See id.* at 564 (citing increased graduation rates of African-American students as one of NCAA's primary goals in adopting Proposition 16). The effect of Proposition 16 has been to decrease the number of eligible African-American student-athletes, while maintaining the number of eligible white student-athletes. *See Mondello & Abernathy*, *supra* note 58 at 137-38.

151. *See Pryor*, 288 F.3d at 564 (stating NCAA enacted Proposition 16 because it at least partially intended to prevent more African-American student-athletes from becoming eligible).

The appellate court rejected the ruling of the district court, stating "the NCAA adopted Proposition 16 'in spite of' its impact on black athletes, not 'because of' that impact."¹⁵² By relying on the face of the complaint and "all reasonable inferences thereto," the appellate court found that the NCAA partly intended to reduce the number of African-Americans eligible for athletic scholarships.¹⁵³

In its defense, the NCAA asserted that the complaint proved only that the organization intended to help African-American athletes, arguing based on precedent, which "absolve[s] decisionmakers from purposeful-discrimination liability so long as their intent was 'benign' or (in the words of Plaintiffs' counsel in *Cureton*) 'laudable.'"¹⁵⁴ The court rejected this argument, stating that although it was difficult to imagine that the NCAA embraced sinister motives, a policy that purposefully discriminates on account of race is presumed void unless it survives strict scrutiny.¹⁵⁵ The claim of purposeful discrimination would remain intact until after a finding of fact that the NCAA did not intend to discriminate on the basis of race.¹⁵⁶

2. Touchdown Declared by Referee and Critics

The Third Circuit correctly concluded that the plaintiffs' claim of purposeful discrimination was valid and could withstand a motion to dismiss.¹⁵⁷ First, the plaintiffs only had available to them a

152. *Id.*

153. *See id.* at 564 (describing complaints and impact of pre-Proposition 16 studies).

154. *Id.* at 565 (explaining two reasons why NCAA's argument was unconvincing).

First, . . . the complaint adequately allege[d] that the NCAA sought to achieve its stated goal of improving graduation rates by using a system that would exclude more African-American freshmen who, in the past, might have qualified for scholarships. Second, even assuming the NCAA's assertion that it had only "laudable" goals in adopting Proposition 16 and that it actually wanted only to improve graduation rates among black student athletes, the NCAA . . . cited no authority holding that a claim for purposeful discrimination may lie only if the accused decisionmaker had "bad intentions" or "animus."

Id. at 565-66.

155. *See id.* at 566 ("[A]t first glance, some might well consider this theory far fetched[, b]ut we are reviewing this case at the pleading stage, not the summary judgment stage.").

156. *See id.* (explaining that after discovery period and trial, further facts may prove plaintiffs' allegations false).

157. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (holding private cause of action possible under purposeful discrimination); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (explaining showing of purposeful discrimination needed to survive strict scrutiny to be validated); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 378 (1982) (ruling liability under § 1981 required showing of pur-

claim of purposeful discrimination.¹⁵⁸ A claim of disparate impact, which the court validly dismissed, is not allowed by private individuals under Title VI.¹⁵⁹ African-American student-athletes who had been affected by the NCAA's academic requirements attempted to persuade courts that the "SAT cut-off score ha[d] no demonstrable relationship to a permissible goal under a disparate impact analysis."¹⁶⁰ The Supreme Court in *Alexander*, however, put an end to disparate impact suits under Title VI.¹⁶¹ The Court held that Title VI does not forbid unintentional discrimination like disparate impact.¹⁶² Only claims of intentional discrimination may be made under Title VI.¹⁶³

Upholding the § 1981 claim was valid because a showing of purposeful discrimination is the only way to claim relief under § 1981.¹⁶⁴ The plaintiffs could demonstrate that the NCAA knew that Proposition 16 would have adverse effects; thus, the court correctly concluded that there was sufficient showing to illustrate that the NCAA could have instituted Proposition 16 for that reason.¹⁶⁵

The Third Circuit ruled that the complaint sufficiently set forth a valid allegation of purposeful discrimination, thus addressing the alternative theory of deliberate indifference was unneces-

purposeful discrimination); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasizing plaintiffs must show policy was instituted "because of," not "in spite of" adverse effects on racial minority); *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir. 1996) (stating plaintiffs must do more than simply assert disparate impact). For a further explanation, see *supra* notes 95-102 and accompanying text.

158. See *Alexander*, 532 U.S. at 281 (showing claim of purposeful discrimination is only allowed in private cause of action).

159. See *id.* (concluding disparate impact claim was not allowed in private cause of action under Title VI).

160. Lesley Chenoweth Estevao, Comment, *Student-Athletes Must Find New Ways to Pierce the NCAA's Legal Armor*, 12 SETON HALL J. SPORTS L. 243, 244-45 (2002) (explaining theories used prior to Supreme Court decision in *Alexander*).

161. See *id.* at 245 (providing no remedy for private plaintiffs against private entities for violation of disparate impact regulations promulgated under Title VI by federal agencies).

162. See *Alexander*, 532 U.S. at 275; Estevao, *supra* note 160, at 245 (explaining Congress does not provide right to enforce regulations going beyond proscriptions of Title VI).

163. See *Alexander*, 532 U.S. at 281 (holding Title VI claims can only be made for intentional discrimination).

164. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388-89 (1982) (holding § 1981 liability requires showing of purposeful discrimination).

165. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

sary.¹⁶⁶ Nonetheless, because the plaintiffs continued to pursue deliberate indifference as an alternative theory, the court elected to address it.¹⁶⁷ The court rejected the theory as a reasonable basis for relief by showing that Title VI “directly reache[d] only instances of intentional discrimination.”¹⁶⁸ By claiming deliberate indifference, the plaintiffs implicated extreme indifference by the NCAA regarding the impact Proposition 16 had on African-American athletes.¹⁶⁹ According to the complaint, it did not matter whether the discrimination was intended.¹⁷⁰ The court found no significant distinction between the deliberate indifference rule offered by the plaintiffs and the established rule that a decisionmaker does not commit purposeful discrimination if he or she adopts a facially neutral policy “in spite of,” not “because of,” its impact.¹⁷¹ The Third Circuit ruled correctly that the plaintiffs’ theory of disparate impact could not stand because the Supreme Court ruled in *Alexander* that there was no private right of action for disparate impact.¹⁷²

C. § 1981: Third Circuit Goes for a Two Point Conversion

By holding that the plaintiffs’ complaint sufficiently alleged purposeful discrimination, the court also determined that the plaintiffs had fulfilled two of the three elements necessary in a § 1981 analysis.¹⁷³ The first prong of a § 1981 analysis requires that

166. See *Pryor v. NCAA*, 288 F.3d 548, 567 (3d Cir. 2001) (explaining that because one cause of action can survive motion to dismiss, it does not matter if other one can).

167. See *id.* (noting because plaintiffs continued to push theory, court had to explain its reasoning for its rejection).

168. See *id.* (indicating difference between disparate impact and purposeful discrimination, and that only purposeful discrimination can be claim for relief under Title VI and § 1981).

169. See *id.* (describing how plaintiffs tried to evade court’s ruling by claiming higher degree of indifference).

170. See *id.* (explaining indifference was inconsequential and only purposeful discrimination matters).

171. See *Pryor*, 288 F.3d at 568 (noting no difference in standards and thus because court already found that NCAA enacted Proposition 16 “because of” its impact on African-American student-athletes, plaintiffs’ disparate impact theory was irrelevant); see also *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279-80 (1979) (finding no discriminatory purpose because “the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women”).

172. See *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) (denying claim that “[t]o reject a private cause of action to enforce the disparate-impact regulations . . . [the court] would [have] to ignore the actual language of [precedent]”).

173. See *Pryor*, 288 F.3d at 569 (elaborating on three prongs of § 1981 analysis).

a plaintiff show that he or she is a member of a racial minority.¹⁷⁴ In this case, both plaintiffs were African-Americans, a minority ethnicity in the United States.¹⁷⁵ The second prong requires that the plaintiffs show that the defendants intended to discriminate on the basis of race.¹⁷⁶ Because the standard for establishing an intent to discriminate is the same for Title VI and § 1981, the court's ruling that the complaint was sufficient to uphold a claim for purposeful discrimination fulfilled this prong.¹⁷⁷ Finally, the plaintiffs must show that the discrimination concerned one of the activities covered by § 1981.¹⁷⁸ In this case, the activity was the right to contract.¹⁷⁹

D. Pryor Wins, but Gives Up Some Points Along the Way

The Third Circuit affirmed the dismissal by the district court of Pryor's ADA and Rehabilitation Act claims.¹⁸⁰ Yet, it reversed the district court's dismissal of the Title VI and § 1981 claims, so long as the claims rested on purposeful discrimination.¹⁸¹ As of the date of this Note, these claims await decision by the district court.¹⁸²

V. IMPACT

After the Third Circuit decisions in *Cureton I* and *Cureton II*, which prohibited discrimination cases to be premised on the theory of disparate impact, many feared there would be no avenue of redress for plaintiffs who alleged harm from discriminatory policies of the NCAA.¹⁸³ The Third Circuit, however, breathed life into dis-

174. *See id.* (explaining first prong of § 1981 analysis).

175. *See id.* at 554 (noting minority status of plaintiffs).

176. *See id.* at 569. A showing of purposeful discrimination on the face of the pleadings fulfills this prong. *See id.*

177. *See id.* (citing prior reasoning that purposeful discrimination was sufficiently alleged in plaintiffs' complaint).

178. *See* 42 U.S.C. § 1981 (2000) (explaining ability to enter into contracts is one activity covered by § 1981).

179. *See Pryor*, 288 F.3d at 569. The NCAA could not avoid liability simply because the conditions of the NLIs were not fulfilled. *See id.* Provided that the plaintiffs can show that the NCAA enacted Proposition 16 (the condition that both plaintiffs failed to meet) for the purpose of racial discrimination, the condition will be void. *See id.*

180. *See id.* at 570 (discussing affirmation of district court's dismissal of ADA and Rehabilitation Act claims for lack of constitutional standing).

181. *See id.* (explaining reversal of dismissal of Title VI and § 1981 claims under allegations of purposeful discrimination only, not deliberate indifference).

182. *See id.* (noting case was remanded for proceedings on Title VI and § 1981 claims).

183. *See* Estevao, *supra* note 160, at 278 (stating Proposition 16 cannot be attacked in a private suit as unintentional racial discrimination).

crimination claims by allowing purposeful discrimination claims in *Pryor*.¹⁸⁴ In effect, it simply was following the Supreme Court's lead.¹⁸⁵ The Court had determined that unintentional discrimination, like disparate impact, could not be brought under Title VI, but intentional discrimination, like purposeful discrimination, could prevail.¹⁸⁶ The window of opportunity has been opened to plaintiffs; it is now a waiting game to see if it will remain open.¹⁸⁷

The future of the NCAA's initial eligibility requirements is, at present, still uncertain. Perhaps *Pryor* and other cases like it finally have forced the NCAA to assess whether these eligibility requirements truly uphold the purposes for which they were enacted. Yet, after decades of defending controversial initial eligibility requirements both inside and outside the courtroom, the NCAA is expected to institute new eligibility requirements.¹⁸⁸ The NCAA Division I Board of Directors met in Indianapolis in August of 2002 to discuss a "large-scale, three-phase academic reform package."¹⁸⁹ The new requirements, if enacted, would take effect in the 2003 to 2004 academic year.¹⁹⁰

One of the proposals being reviewed by the Division I Board of Directors would increase the number of required high school core courses from the present thirteen to fourteen.¹⁹¹ Eligibility would still be decided on a sliding scale, weighing both GPA and standardized test scores.¹⁹² The proposal is favored by the NCAA president, the Division I Board of Directors, and the six major Division I athletic conferences, who claim that this proposal de-emphasizes the standardized test scores.¹⁹³

184. See *Pryor*, 288 F.3d at 560 (holding plaintiffs' allegations of purposeful discrimination had merit and could be propounded).

185. See *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) ("Title VI itself directly reaches only instances of intentional discrimination.").

186. See *id.*

187. See *Pryor*, 288 F.3d at 570 (stating Third Circuit remanded in part back to district court for proceedings consistent with decision).

188. See *Asher*, *supra* note 1, at D1 (stating NCAA has been defending its use of standardized test scores for twenty years and now appears to be discussing new requirements).

189. See *id.* (reporting on meeting which occurred on August 8, 2002 to discuss proposed changes).

190. See *id.* (citing time constraints, special dates for voting, and institution of new requirements if approved).

191. See *id.* (discussing proposed changes to Proposition 16's number of core course requirements).

192. See *id.* The new proposal's sliding scale will allow a student with an 800 on the SAT to counter-balance with a 3.55 GPA. See *id.* This is unlike Proposition 16 where the sliding scale stops at a minimum SAT or minimum GPA. See *id.*

193. See *Asher*, *supra* note 1, at D1 (mentioning supporters of new proposal).

Ideally, all parties affected will accept whatever new initial eligibility standards the NCAA decides should replace Proposition 16. If so, college bound athletes may not need to litigate eligibility in order to get into the game.

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